Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1996

FRILLZ, INC.,

Petitioner,

v.

AIDA ALVAREZ, AS ADMINISTRATOR OF THE UNITED STATES SMALL BUSINESS ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the undesignated statutory language following 15 U.S.C. § 636(a)(6)(C) was repealed along with the remainder of subparagraph (C) in 1985, despite its continued printing in the United States Code?

2. Whether the United States Court of Appeals for the First Circuit erred in holding that Small Business Administration field officer's actions exceeded the officer's authority?

PARTIES TO THE PROCEEDING

Frillz, Inc. ("Frillz") was plaintiff-appellant below. Philip Lader, the former Administrator of the United States Small Business Administration ("SBA"), was defendant-appellee below. Respondent, Aida Alvarez ("Alvarez"), is the current SBA Administrator. Pursuant to Supreme Court Rule 35.3, Alvarez, as successor in office, is substituted as the respondent.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner notes that Frillz, Inc. is a closely held corporation, with no parent corporations and no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Frillz, Inc. respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 104 F.3d 515 (1997), and is reprinted in the Appendix ("App.") at App. 1-9.

The order of the District Court for the District of Massachusetts granting the respondent's motion for summary judgment is reported at 925 F.Supp. 83 (D.Mass. 1996), and is reprinted in the Appendix at App. 12-21.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on January 21, 1997. Frillz filed a timely Petition for Rehearing, which was denied on February 20, 1997. App. 10-11. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

15 U.S.C. § 636(a)(6) (1982)

15 U.S.C. § 636(a)(6) (1988)

13 C.F.R. § 101.3-2 (1993)

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Title XIX, § 1910, 95 Stat. 357, 778 (1981)

These provisions are reprinted, in pertinent part, in the Appendix at App. 22-25.

STATEMENT OF THE CASE

Factual Background

The petitioner Frillz, Inc. was a small woman-owned retailer of designer women's apparel. In February 1993, Frillz, through Eastern Bank, applied to the Small Business Administration under a program whereby the SBA would guaranty 80% of a loan in the amount of $612,000. These funds of which were to be used to expand from 14 to 17 stores and to refinance $240,000 of existing indebtedness. The lender for the guaranty loan was Eastern Bank, of Salem, Massachusetts ("Lender"). SBA subsequently approved the request for an 80% guaranty of the loan, and issued a Loan Authorization and Agreement ("Agreement").

The Agreement contained a provision requiring receipt by the Lender of "evidence satisfactory to it in its sole discretion, that there has been no unremedied adverse change since the date of the application ... in the financial conditions of [Frillz], which would warrant withholding or not making any such disbursement." Subsequently Frillz suffered a loss of $189,000 during the third quarter of fiscal year 1993. Frillz returned to profitability in the fourth quarter of fiscal 1993, achieving record quarterly earnings of $321,000. In September 1993, the Lender concluded that the adverse financial change Frillz had experienced had been remedied to its satisfaction, and so informed the SBA by letter. On October 25, 1993, the SBA sent a letter to the Lender stating that "SBA [did] not agree with [the Lender's] determination that the adverse change ha[d] been remedied." This letter indicated a refusal to activate the guaranty and an extension of the disbursement period to April, 1994.

Course of the Proceedings

District Court

Frillz subsequently filed suit in the United States District Court for the District of Massachusetts against the Administrator of the SBA. Federal jurisdiction in the district

court was based on 15 U.S.C. § 634(b)(1), which provides that "[i]n the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator [of the SBA] may sue and be sued ... in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount of the controversy."

On cross-motions for summary judgment, the district court granted the SBA's motion, and ordered dismissal of the case. The district court based its decision on a *proviso* contained in the block of text which follows subsection (C) of 15 U.S.C. § 636(a)(6). The text is not designated by letter or number which would indicate with what statutory subdivision it belonged, but is indented flush with full paragraph (6). The language limits SBA's guaranties of deferred participation loans, and also purports to limit the SBA's authority to delegate "any authority conferred by this subparagraph" to "other than Administration personnel." Undesignated text following 15 U.S.C. § 636(a)(6)(C) (1988). Subparagraph (C), which immediately precedes this provision, was repealed by the sunset provision of the statute which enacted it, effective October 1, 1985. Omnibus Budget Reconciliation Act of 1981 ("OBRA") Pub. L. No. 97-35, Title XIX, § 1910, 95 Stat. 357, 778 (1981).

Paragraph (6) requires that all SBA "loans made under this subsection be of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(6). Frillz argued that the provision was a part of subparagraph (C), despite its indentation, and that it was therefore repealed in 1985. The district court, without considering the text of subparagraph (C) before its repeal, and the manner in which the undesignated language might have fit in with it contextually, disagreed, and held that the text limited the SBA's authority to delegate determinations of creditworthiness to outside agencies. App. 20. Although it no longer contains any active grants of authority,[1] the district court reasoned that Congress

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[1] Subparagraph (C), before its repeal, did contain active grants of

intentionally indented the undesignated provision in this manner, and that this was evidence of congressional intent to limit SBA's delegation authority with regard to its decisions regarding the soundness of loans. *Id.* at 19. Thus, the court read the term "subparagraph" as "paragraph" in interpreting the statute. *Id.* at 18. Because the Agreement made such a designation, the district court held that the clause giving the lender responsibility for determining whether an adverse change had been remedied exceeded the Administration's authority, and the Agreement was therefore void. *Id.* at 20-21.

Court of Appeals

Frillz appealed to the United States Court of Appeals for the First Circuit, which affirmed the district court's order. Frillz again argued that Congress intended the undesignated language to be repealed in 1985, pointing to the context of the language, statements in Committee Reports on the bill which indicated that it was to be repealed in 1985, as well as inconsistent indentation in various printings of the provision indicating that the indentation was unintentional.[2]

The SBA argued that subsequent legislative history, in the form of two Senate Committee Reports, made nine and eleven years after the enactment of the bill, indicated congressional belief that the undesignated language was still in force, and also showed that Congress did not intend to repeal the language. It also argued that SBA regulations prohibited the Chief of the Financing Division, the official who entered into the Agreement with Frillz, from assigning responsibility the Lender to determine whether an adverse change had been remedied.

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authority, namely the authority to determine whether certain conditions were met under which SBA could decline to participate in deferred participation loans used to refinance existing debt. 15 U.S.C. § 636(a)(6)(C).

[2] Although the provision was printed in the Statutes at Large in its current form, *see* 95 Stat. at 769, the House Committee Report and the official printing of the bill, as ordered by the Committee, indented the provision under subparagraph (C), not under full paragraph (6). *See* H.R. REP. NO. 97-150, at 78 (1981); H.R. 2998, 97th Cong. § 2(a)(6)(C) (1981).

The Court of Appeals declined to base its final decision on the issue of the repeal of the undesignated text following § 636(a)(6)(C). App. 4. It noted that the question was "freighted with uncertainty," and that, while the context of the provision leads to the conclusion that the undesignated text is part of subparagraph (C), *id.* at n. 2, the text's indentation indicates an opposite result, and that to hold the provision repealed "would violate the principle that implied repeals of federal statutes are disfavored." *Id.* In addition, the court stated that, because of the subsequent legislative history cited by the SBA, "a court would be hard-pressed to find that the sentence had been deleted in 1981."[3] *Id.*

Instead, the court decided the case on the basis of the SBA regulations. App. 4. The regulations provide that the Chief of the Finance Division had the authority to approve or disapprove loans up to $750,000, 13 C.F.R. § 101.3-2, Pt. I, § A(1)(b)(7) (1993), but that he could not delegate this authority further. *Id.* at Pt. XI, § A(1). The First Circuit held that the SBA regulations prevented the Financing Division Chief from entering into the Agreement's adverse change clause, and that the Agreement was therefore *ultra vires*, and void. App. 5-6.

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[3] Frillz argued that the provision was deleted in 1985. *See* Pub. L. No. 97-35, Title XIX, § 1910, 95 Stat. at 778 (1981).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS THE IMPORTANT ISSUE OF WHETHER CONGRESS INTENDED TO REPEAL THE UNDESIGNATED LANGUAGE FOLLOWING SUBPARAGRAPH (C) OF 15 U.S.C. § 636(a)(6), WHICH THE COURT OF APPEALS ALLOWED TO REMAIN IN FORCE.

A. The decision of the Court of Appeals is based on rationale which conflicts with prior decisions of this Court.

The Court of Appeals declined to hold that the undesignated language following subparagraph (C) of 15 U.S.C. § 636(a)(6) was repealed in 1985, along with the remainder of subparagraph (C), for several reasons which conflict with the decisions of this Court.

1. The Court of Appeals gave more weight to the form than to the content of the statute.

"Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 455, 113 S.Ct. 2173, 2182 (1993) (citation and internal quotation marks omitted). The Court of Appeals, while recognizing the coherence of the substance of the statute, attributed more legislative significance to its form than to its content.

The court first stated, "When one examines the content of section 636(a)(6) as it appeared before Congress amended it in 1981 through the OBRA, the final sentence fits comfortably, in structural terms, with subsection (C)."[4] App. 4 n. 2.

[4] The Court of Appeals incorrectly described the situation which led to the statute's current form. All of 15 U.S.C. § 636(a)(6), as it currently exists, and as it existed prior to the repeal of subsection (C), is attributable to the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, Title XIX, § 1902, 95 Stat. 357, 767-771 (1981). Section 1910 of

Nevertheless, it went on to say that, because of the provision's indentation, "[i]t did not appear from the form of the statute to have been part of subsection (C); and ... Congress specified only that subsection (C) was repealed." *Id.* at 4-5 n. 2.

This Court has held that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935 (1975) (Powell, J., concurring) (quoted in *Watt v. Alaska*, 451 U.S. 259, 265, 101 S.Ct. 1673, 1677 (1981)). The Court of Appeals, in placing greater weight on the indentation than on the language itself, strays from this rule of construction.

This is especially important here, because the indentation on which the Court of Appeals places so much weight appears to have been a mere printing error or inconsistency. The House Committee which reported the original bill had indented the provision under subparagraph (C). H.R. REP. NO. 97-150, at 78 (1981). The official printing of the bill also shows the provision indented under subparagraph (C). H.R. 2998, 97th Cong. § 2(a)(6)(C) (1981).

Thus, the Court of Appeals apparently allowed a mere printing inconsistency determine Congressional intent, rather than putting proper weight on the substance and content of the statutory language itself.

2. The Court of Appeals' invocation of the rule discouraging repeal by implication is misplaced.

The Court of Appeals is misguided by the maxim that implied repeals of statutes are disfavored. The court found that "to hold now that the final undesignated sentence comprised part of ... subsection [(C)] would violate the principle that implied repeals of federal statutes are disfavored." App. 4-5 n. 2.

OBRA contained the sunset provision for subsection (C). *See id.* at § 1910, 95 Stat. at 778.

An implied repeal of a statute or statutory text occurs "when two statutes are repugnant in any of their provisions, [and] the later act, even without a specific repealing clause, operates to the extent of the repugnancy to repeal the first." 1A Sutherland, *Statutes & Statutory Construction* § 23.09 (Singer 5th Ed., 1992). "[R]epeals by implication are strongly disfavored, so that a later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *United States v. Fausto*, 484 U.S. 439, 453, 108 S.Ct. 668, 676 (1988).

Here, there are not two separate statutes, the later of which is repugnant to the other. Rather, there are two sections of a single legislative enactment, the second of which prospectively repeals a portion of the first at a certain date. Pub. L. No. 97-35, Title XIX, §§ 1902 & 1910, 95 Stat. at 767-779 (Aug. 13, 1981). Section 1902 enacted the provision, and section 1910 repealed it effective October 1, 1985. Thus, the repeal here is explicit, not implicit, and the court's reliance on the rule is unjustified and improper.

3. The Court of Appeals failed to consider the prior legislative history of the bill, while giving too much weight to the subsequent legislative history.

The court based its decision, in part, on the subsequent legislative history of the provision, while failing to consider the prior legislative history of the bill prior to its enactment.

> Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure, and other like extraneous matter, may be taken into consideration to aid in the ascertainment of the true legislative intent.

United States v. Missouri Pac. R. Co., 278 U.S. 269, 278, 49 S.Ct. 133, 136 (1929).

> In surveying legislative history [this Court] ha[s] repeatedly stated that the authoritative source for finding the

> Legislature's intent lies in the Committee Reports on the bill which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation."

Garcia v. United States, 469 U.S. 70, 76, 105 S.Ct. 479, 483 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186, 90 S.Ct. 314, 324 (1969)).

House of Representatives Report No. 97-150, submitted on June 16, 1981 by the Committee on Small Business, elucidates the issue of whether the language in question belongs with subparagraph (C) or with its parent, paragraph (6). The Committee was reporting on H.R. 2998, which was incorporated into Public Law 97-35, Title XIX. Thus, the Committee's views directly reflect its intent, which intent was transferred to Congress by congressional approval of the bill, as recommended by the Committee.

Following the heading "What the Bill Would Do," the Committee states: "H.R. 2998 would provide specific provisions under which SBA loans may be used to refinance prior indebtedness and that loans for such purpose be limited to an 80-percent guarantee rather than 90 percent.... *[T]his provision ... would be sunset October 1, 1985.*" H.R. REP. NO. 97-150 at 62 (emphasis supplied). The Committee also notes, under the same main heading, that "[t]he new refinancing ... program[] unless extended, would expire on October 1, 1985." *Id.* at 63. The provisions which relate to SBA guaranties of loans to refinance prior debts are included in subparagraph (C), including the text in issue, and *only* in subparagraph (C). Specifically, the 80 percent limitation is in the *proviso* following clause (ii) of subparagraph (C). The fact that the Committee noted that the "provision" — singular — would be repealed indicates that the Committee considered both the enumerated portions of subparagraph (C) as well as the undesignated text following those portions to be one single subdivision of paragraph (6).

In addition, under the section of the report entitled

"Changes in Existing Law Made by the Bill, as Reported," the text in question appears, not flush to the left margin, as in some other printings, but indented in line with subparagraph (C). H.R. REP. NO. 97-150 at 78. This also is telling evidence of the Committee's, and Congress', intent with regard to the inclusion of the disputed text within subparagraph (C). As stated above, the official printing of the bill also contained the provision indented in this manner. H.R. 2998, 97th Cong. § 2(a)(6)(C) (1981).

The Court of Appeals ignored all of this evidence of prior legislative intent while also ignoring "the oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 2061 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332 (1960)); *see also Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8, 100 S.Ct. 1932, 1938 n. 8 (1980); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 2678 (1990).

Nevertheless, the Court of Appeals gave greater weight in determining the intent of the 97th Congress to two House reports by the 101st and 102d Congresses, which referred to the 80 percent guaranty limit contained in the provision, than to the Committee Report of the Congress which actually enacted the provision. App. 4-5 n. 2; *see* H. REP. NO. 101-667, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3990, 3992; H.R. REP. NO. 102-492, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 891, 892. These reports were issued more than eight and ten years after the enactment of the provision, and four and six years, respectively, after its repeal. No inference of congressional intent is justified. The Congresses' belief that the provision was in force could have been predicated on the continued printing of the provision in the United States Code, since "the appearance of a provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law." *U.S. Nat'l Bank of Oregon*, 508 U.S. 439, 448, 113 S.Ct. 2173, 2179 (1993) (quoting 1 U.S.C. §§ 204(a)).

Because "subsequent legislative history is not dispositive," the reliance by the Court of Appeals on subsequent Congresses' belief regarding the status of the provision in question is directly at odds with this admonition. *Zipes v. Trans World Airlines*, 455 U.S. 385, 394, 102 S.Ct. 1127, 1133 (1982) (citing *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596, 100 S.Ct. 800, 813 (1980); *Cannon v. University of Chicago*, 441 U.S. 677, 686 n. 7, 99 S.Ct. 1946, 1952 n. 7 (1979)).

B. The text in question contains a limitation to which SBA has been adhering since 1981, and which may have been repealed in 1985, despite its continued printing in the United States Code.

The undesignated text following subparagraph (C) of 15 U.S.C. § 636(a)(6) mandates that:

> [o]n that portion of the loan used to refinance existing indebtedness held by a bank or other lending institution, the Administration shall limit the amount of deferred participation to 80 per centum of the amount of the loan at the time of disbursement ....

Based on its continued appearance in the United States Code, the SBA has been limiting its participation in such loans according to the language of the provision. However, if the provision has been repealed, no such limitation exists, and SBA may participate to a greater extent in deferred participation loans to refinance existing debt.

This Court is presented with the opportunity to decide this matter conclusively, and either correct the keepers of the United States Code by deciding that the provision has been repealed, or clarify the provision's terms while holding that the provision is still in force. Either result is important for clarifying the language of the statute.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SBA'S CHIEF OF THE FINANCING DIVISION EXCEEDED HIS AUTHORITY BY ENTERING INTO THE AGREEMENT IN THIS CASE.

The Court of Appeals held that the Chief's actions in delegating responsibility to the Lender to determine whether an adverse financial change had been remedied violated SBA regulations, without specifying precisely in what manner the adverse change clause falls under the delegation of the approval of SBA loans. App. 6-7.

The Chief of the Financing Division ("Chief") entered into a contract with Frillz on behalf of SBA for an 80 percent guaranty on a $612,000 loan. Pursuant to SBA delegation regulations, the Chief has the authority to approve section 7(a) business loans to an SBA share of $750,000, 13 C.F.R. § 101.3-2, Pt. I, § A(1)(b)(7) (1993), and, on "fully disbursed loans," "[t]o cancel, reinstate, modify, and amend authorizations," *id.* at § B(2)(g), as well as make unlimited disbursement period extensions, *id.* at § B(3)(a)(7). The regulations also state that "[t]he authority delegated herein may not be redelegated." *Id.* at Pt. XI, § A(1). Thus, the Chief was authorized to approve section 7(a) loans, *id.* at § A(1)(b)(7), but was not authorized to authorize anyone else to approve section 7(a) loans. *Id.* at Pt. XI, § A(1). The adverse change clause of the Agreement does not constitute a delegation of the authority to "approve" an SBA loan, and therefore does not exceed the Chief's authority. *Id.* at Pt. I, § A(1)(b)(7).

Moreover, the Chief appeared to be using a form approved by the Acting Administrator of the SBA. The Agreement purports to have the approval of Dayton J. Watkins, SBA's Acting Administrator, with a typewritten endorsement. The Administrator (or Acting Administrator) would unquestionably have had the authority to enter into this Agreement. Therefore, since the Chief was acting under the apparent authority of the Acting Administrator, the Court of Appeals erred in holding the Chief's actions *ultra vires*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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Dated: May 21, 1997

APPENDICES

APPENDIX A

United States Court of Appeals
for the First Circuit

No. 96-1785

FRILLZ, INC.,

Plaintiff, Appellant,

v.

PHILIP LADER, AS ADMINISTRATOR OF THE
UNITED STATES SMALL BUSINESS ADMINISTRATION,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, *U.S. District Judge*]

Before

Selya and Stahl, *Circuit Judges*,

and Woodlock, * *District Judge*.

Evans J. Carter, with whom *Hargraves, Karb, Wilcox & Galvani* were on brief, for appellant.

Susan M. Poswistilo, Assistant United States Attorney, with whom *Donald K. Stern*, United States Attorney, and *Glenn P. Harris*, Office of the General Counsel, Small Business Administration, were on brief, for appellee.

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* Of the District of Massachusetts, sitting by designation.

January 21, 1997

SELYA, *Circuit Judge.* Plaintiff-appellant Frillz, Inc., a Massachusetts corporation, seeks damages for breach of contract against Philip Lader, in his capacity as administrator of the federal Small Business Administration (SBA). The plaintiff bases its suit on the SBA's alleged refusal to honor a loan guaranty commitment. The district court granted summary judgment for the SBA. We affirm.

I.

Background

In February 1993, Frillz asked the SBA to guaranty a proposed loan. Frillz contemplated that the loan would be made by Eastern Bank (the Lender) in the principal amount of $612,000. Of this amount approximately $240,000 would be used to retire indebtedness owed to Fleet Bank, and the balance would be used to expand Frillz's retail operations from fourteen to seventeen stores.

In due course, the SBA approved Frillz's application for an 80% guaranty of the loan. The SBA's loan guaranty authorization contained a clause requiring receipt by the Lender of "evidence satisfactory to it in its sole discretion, that there has been no unremedied adverse change since the date of the Application ... in the financial or any other conditions of [Frillz], which would warrant withholding or not making any such disbursement."

Frillz struggled in the third quarter of fiscal 1993 (February through April), losing $189,000. In the next quarter, however, its operations returned to profitability. The Lender subsequently concluded that the adverse change in Frillz's financial picture had been remedied. Notwithstanding the Lender's satisfaction, the SBA balked; it informed the Lender that it did not believe that the adverse change had been sufficiently ame-

liorated. And, it announced that any disbursement of the loan must have the approval of both the SBA and the Lender.

Frillz filed suit claiming that the SBA had reneged on its agreement that the Lender would have sole discretion to determine whether there had been an uncorrected adverse change in Frillz's financial condition. On cross-motions for summary judgment, the district court concluded that, under 15 U.S.C. § 636(a)(6) (1994), the SBA could not delegate the authority to determine the financial security of a loan to any outsider. *See Frillz, Inc. v. Lader*, 925 F. Supp. 83, 88 (D. Mass. 1996). Hence, the court entered judgment in the defendant's favor. *See id.* This appeal followed.

II.

Analysis

Summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Our review of the district court's grant of summary judgment is plenary, and in canvassing the record we indulge all reasonable inferences in favor of the party opposing the motion. *See Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990). We are not bound by the rationale of the lower court but may instead affirm an entry of summary judgment on any alternative ground made manifest by the record. *See Hachikian v. FDIC*, 96 F.3d 502, 504 (1st Cir. 1996). We follow that avenue here.

Frillz challenges the district court's holding that 15 U.S.C. § 636(a)(6) precludes the SBA from delegating to other than in-house personnel on several grounds. It argues that Congress in 1981 repealed the language in section 636(a)(6) that restricts the SBA's power to delegate, and thus that there is no statutory impediment to the SBA's delegation of authority to the Lender.[1] Alternatively, it asserts that even if Congress did not

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[1] We set out in the Appendix the text of 15 U.S.C. § 636(a)(6) as it appeared before Congress amended it by enacting the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97-35, § 1910, 95 Stat. 778 (stating *inter alia* that section 636(a)(6)(C), which Congress described as

repeal the disputed portion of section 636(a)(6), that statute should not be interpreted to bar delegation of the SBA's authority. These questions are not without complication; indeed, the district court aptly described the task of answering them as "somewhat pedantic and unavoidably ponderous." *Frillz*, 925 F. Supp. at 86. We spare ourselves that difficulty, for the record allows us to reach the same destination by an easier, less labyrinthine path: the SBA official who approved Frillz's loan guaranty lacked power under existing SBA regulations to delegate his authority further.[2]

"[s]ection[] 7(a)(6)(C) ... of the Small Business Act [is] repealed [as of] October 1, 1985"). Frillz claims that Congress thereby intended to repeal not only section 636(a)(6)(C) proper but also the last sentence of 15 U.S.C. § 636(a)(6) (which states in part that "any authority conferred by this subparagraph on the Administration shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel"). This sentence appears below section 636(a)(6)(C) without any further letter or numerical reference, yet without indentation. The compilers of the code apparently determined that this sentence did not comprise part of section 636(a)(6)(C), but Frillz disagrees.

[2] The question of whether Congress repealed the final sentence of section 636(a)(6) is freighted with uncertainty. When one examines the content of section 636(a)(6) as it appeared before Congress amended it in 1981 through the OBRA, the final sentence fits comfortably, in structural terms, with subsection (C). At that time, section 636(a)(6) began by stating that SBA loans must be "of such sound value or so secured as reasonably to assure repayment," and subsections (A), (B), and (C) each limited this requirement: subsection (A) with respect to loans to assist any handicapped individual; subsection (B) with respect to loans for energy measures; and subsection (C) with respect to loans used to refinance indebtedness. The first clause of the final undesignated sentence also dealt with loans used to refinance existing indebtedness. It is thus reasonable to suggest that the final sentence of section 636(a)(6) comprises a part of subsection (C).

On the other hand, when Congress passed the OBRA, the final sentence of section 636(a)(6) appeared as it does now: below the three subsections, unindented. It did not appear from the form of the statute to have been part of subsection (C); and, since Congress specified only that subsection (C) was repealed, to hold now that the final undesignated sentence comprised part of that subsection would violate the principle that implied repeals of federal statutes are disfavored. *See Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 790 (1st Cir. 1996). Moreover, subsequent Congresses assumed that the final sentence survived the repeal, *see, e.g.*, H.R. Rep. No.

A suit against a federal official in his official capacity is in effect a suit against the government. *See American Policyholders Ins. Co. v. Nyacol Prods., Inc.*, 989 F.2d 1256, 1259 (1st Cir. 1993). We recently observed that "parties seeking to recover against the United States in an action *ex contractu* have the burden of demonstrating affirmatively that the agent who purported to bind the government had actual authority to do so." *Hachikian*, 96 F.3d at 505. The statutes governing the SBA permit the head of the agency — the Administrator — to authorize officers and employees of the SBA to exercise powers granted to the agency by Congress. *See* 15 U.S.C. § 634(a). Such delegations are made through agency regulations. *See Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

The regulations in effect when the SBA signed the loan authorization agreement at issue here (February of 1993) stipulated that various individuals in the SBA's employ had power to approve or reject loans up to $750,000. *See* 13 C.F.R. § 101.3-2, Pt. I § A(1)(b) (1993). This group included Gordon J. Ryan, as Chief of the Finance Division, who approved the loan authorization in this case. *See id.* Ryan also had the power to extend disbursement periods and to cancel, reinstate, and modify loan authorizations. *See id.* at § (B). But the regulations did not grant Ryan any power to transfer his authority: to the precise contrary, the regulations explicitly admonished that "[t]he authority delegated herein may not be redelegated." *Id.* at Pt. XI, § A(1).

Frillz does not dispute that any delegation of the SBA's authority must be made pursuant to agency regulations. Instead, it argues that because the Chief of the Finance Division was au-

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101-667, at 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3990, 3992; H.R. Rep. No. 102-492, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 891, 892, and a court for that reason would be hard-pressed to find that the sentence had been deleted in 1981. Although we need not solve this riddle today, we hope that Congress will spare future courts and litigants from choosing between these two disagreeable interpretations of this damaged statute and clarify whether it intends that the final sentence of section 636(a)(6) be preserved.

thorized to approve loans up to $750,000, he was also empowered to set the terms and conditions of such loans, and that a determination by the Lender of whether Frillz had suffered an unremedied adverse financial change was merely a loan term or condition to which Ryan could (and did) assent. This is no more than a play on words. Granting the Lender the right to determine the soundness of a loan guaranty constitutes a significant relinquishment of power. Frillz cannot circumvent the lack of any regulatory authority sufficient to permit this delegation simply by describing it as a term or condition of the loan.

This conclusion is bolstered by the language of 15 U.S.C. § 634(b)(7), a statute that grants the Administrator the power to "authorize participating lending institutions, in his discretion pursuant to regulations promulgated by him, to take such actions on his behalf, including, but not limited to the determination of ... creditworthiness." The Administrator exercised this authority in promulgating regulations creating the so-called Preferred Lenders Program (PLP). *See* 13 C.F.R. § 120.400 *et seq.* (1993). Although section 634(b)(7) does not apply here — Eastern Bank was not a member of the PLP — it strongly suggests that any delegation of the right to determine a prospective borrower's financial stability must be made pursuant to agency regulations. Otherwise, the cited portion of section 634(b)(7) would be superfluous.

We hold, then, that because the Chief of the Finance Division had no authority to delegate to the Lender the determination of whether Frillz had suffered an unremedied adverse change in its financial condition, the government cannot be bound by that stipulation in the loan guaranty authorization.

Frillz has a fallback position: it invites us to remand this case to the district court so that it may pursue an equitable estoppel claim against the SBA. We decline the invitation. The doctrine of equitable estoppel in its traditional incarnation does not apply against the federal government. *See, e.g., OPM v. Richmond*, 496 U.S. 414, 419 (1990); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985); *see also Heckler v. Community Health Servs.*, 467 U.S. 51, 67 (1984) (Rehnquist,

J., concurring) (noting that the Supreme Court has never upheld an estoppel claim against the government). A party seeking to invoke equitable estoppel against the federal government at a minimum "must have reasonably relied on some 'affirmative misconduct' attributable to the sovereign." *VenFuel*, 758 F.2d at 761. Passing the point that even such reliance may be insufficient, *see id.* at 761 n.14, there is absolutely no evidence of affirmative misconduct by the SBA which might arguably be sufficient to support an estoppel claim against the government in this case. *See Hachikian*, 96 F.3d at 506 n.3 (noting that equitable estoppel is generally inapplicable to the federal government when its employees induce reliance by their unauthorized actions).

III.

Conclusion

We need go no further. The Chief of the Finance Division lacked authority to delegate the determination of whether Frillz continued to suffer from the effects of an adverse financial change. Consequently, Frillz cannot rely on that portion of the loan authorization agreement as the basis for a breach of contract claim against the government. It follows inexorably, as night follows day, that the district court did not err in granting summary judgment in the defendant's favor.

Affirmed.

APPENDIX

"The Administration is empowered ... to make loans for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital, and to make loans to any qualified small business concern ... for purposes of this Act. Such financings may be made either directly or in cooperation with banks or other financial institutions through agreements to participate on an immediate or deferred (guaranteed) basis. These powers shall be subject, however, to the following restrictions, limitations, and provisions:

* * *

(6) All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment: *Provided, however*, That —

(A) for loans to assist any public or private organization or to assist any handicapped individual as provided in paragraph (10) of this subsection any reasonable doubt shall be resolved in favor of the applicant;

(B) recognizing that greater risk may be associated with loans for energy measures as provided in paragraph (12) of this subsection, factors in determining `sound value' shall include, but not be limited to, quality of the product or service; technical qualifications of the applicant or his employees; sales projections; and the financial status of the business concern: *Provided further*, That such status need not be as sound as that required for general loans under this subsection; and

(C) the Administration shall not decline to participate in a loan on a deferred basis under this subsection solely because such loan will be used to refinance all or any part of the existing indebtedness of a small business concern, unless the Administration determines that —

(i) the holder of such existing indebtedness is in a position likely to sustain a loss if such refinancing is not provided, and

(ii) if the Administration provides such refinancing through an agreement to participate on a deferred basis, it will be in a position likely to sustain part or all of any loss which would have otherwise been sustained by the holder of the original indebtedness: *Provided further*, That the Administration may decline to approve such refinancing if it determines that the loan will not benefit the small business concern.

On that portion of the loan used to refinance existing indebtedness held by a bank or other lending institution, the Administration shall limit the amount of deferred partici-

pation to 80 per centum of the amount of the loan at the time of disbursement: *Provided further*, That any authority conferred by this subparagraph on the Administration shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel."

15 U.S.C.S. § 636(a)(6) (Law. Co-op. 1984).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1785

FRILLZ, INC.,
Plaintiff, Appellant,

v.

PHILIP LADER, AS ADMINISTRATOR OF THE
UNITED STATES SMALL BUSINESS ADMINISTRATION,
Defendant, Appellee.

Before

Selya and Stahl, *Circuit Judges*,

and Woodlock, * *District Judge*.

Order of the Court

Entered: February 20, 1997

The petition for rehearing attempts to advance an argument that is at best "merely colorable" but "not significantly probative," and, as such, is insufficient to defeat the entry of summary judgment. *See Pagano v. Frank*, 983 F.2d 343, 347 (1st Cir. 1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). In all events, we need not dwell on the substantive deficiencies of the argument. The argument was not made in the appellant's main brief on appeal (or, from what

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* Of the District of Massachusetts, sitting by designation.

we can tell, in the district court). The argument did receive a passing mention in a footnote to the appellant's reply brief, but it was not developed there or thereafter. The argument is, therefore, waived. *See, e.g., Kale v. Combined Ins. Co. of* new arguments in a petition for rehearing), *cert. denied*, 502 U.S. 816 (1991); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 87 (1st Cir. 1990) (holding that parties cannot raise new theories for the first time in a reply brief); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) (referring to the "settled appellate rule" that precludes adverting to issues "in a perfunctory manner, unaccompanied by some effort at developed argumentation," on pain of waiver), *cert. denied*, 494 U.S. 1082 (1990).

The petition for rehearing is denied.

By Order:

William B. Ng,
Clerk

By: Janice M. O'Neil,
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRILLZ, INC.,
Plaintiff,

v.

PHILIP LADER, in his capacity as Administrator of the United States Small Business Administration,
Defendant.

Civil Action No. 94-12409-RCL

MEMORANDUM AND ORDER

Lindsay, District Judge

This case is before the court on the defendant's motion to dismiss, or, in the alternative, for summary judgment, and on the plaintiff's motion for summary judgment. Because the court considered affidavits and other materials outside the pleadings, this motion will be treated as a motion for summary judgment under Fed. R. Civ. P. 56(c). At oral argument, the court denied both parties' motions for summary judgment, except that it reserved judgment on the matter (raised by the defendant) that is the subject matter of this order: the effect of 15 U.S.C. § 636(a)(6) on the contract at issue in this case. After consideration of the arguments of the parties, the statute, and the legislative history, the court concludes that the defendant's motion must be GRANTED.

I. Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), a court "may grant summary

judgment 'if all the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *McCarthy v. Northwest Airlines*, 56 F.3d 313, 314 (1st Cir. 1995), *quoting* Fed. R. Civ. P. 56(c). In this case, there is no material, disputed fact. The appropriateness of summary judgment depends solely on the application of the pertinent statute to the transaction at issue.

II. Facts

This case involves the Small Business Administration ("SBA") guaranty of a loan by the Eastern Bank ("Bank") to Frillz, Inc. ("Frillz"), a small retailer. The SBA agreed to guarantee a loan and then, Frillz claims, breached its agreement by withdrawing its guaranty. Frillz claims losses from the withdrawal of the guaranty which, in turn, foreclosed Frillz' access to the underlying bank loan.

The SBA signed the disputed "Authorization and Loan Agreement" ("Agreement") on February 26, 1993, approving the Bank's request for the SBA to guaranty 80% of a $612,000 loan from the Bank to Frillz. The SBA extended the time for the first disbursement of the loan (initially set at "no more than four months" from the date of the Agreement, Agreement at 2 ¶ 2(b)) a number of times, as evidenced by a series of letters between the SBA and the Bank. During the extended period preceding the disbursement of the loan, Frillz' business suffered. The SBA then refused to authorize disbursement of the funds, allegedly causing damage to Frillz.

The Agreement conditions the loan on "[r]eceipt by lender of evidence satisfactory to it in its sole discretion, that there has been no unremedied adverse change since the date of the Application ..." Agreement at 2 ¶ 2(c). The court concluded at oral argument that this provision unambiguously vests the power to determine whether a change is indeed "unremedied" and "adverse" in the Lender — here, the Bank. The Bank decided there had not been any such change. See Letter of Carol E. Fleit to Anne M. Rice dated September 15, 1993 at 4 ¶ 2

("... I do not believe that it is an unremedied adverse change") (emphasis in original); Letter of Carol E. Fleit to Gordon J. Ryan dated October 19, 1993 at 1 ¶ 1 ("It is Eastern Bank's position that Frillz, Inc. has taken sufficient steps to remedy the adverse change in its financial position ..."). The SBA disagreed, maintaining that determination of whether there had been an "unremedied adverse change" was within its discretion, and refused to authorize disbursement of the loan. See Letter of Gordon J. Ryan to Carol E. Fleit dated October 25, 1993 at ¶ 1 ("The SBA agrees with your determination that an adverse change has occurred with regard to this loan .... SBA does not agree with your determination that the adverse change has been remedied.")

The SBA now argues further that the terms of the Small Business Act, specifically 15 U.S.C. § 636(a)(6), do not allow it to delegate the authority to determine the financial security of a loan it proposes to guarantee.[1]

III. Applicable Statute

15 U.S.C. § 636(a)(6):

> All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment: *Provided, however*, That —
>
> (A) ...
>
> (B) ...
>
> (C) [Repealed]
>
> On that portion of the loan used to refinance existing indebtedness held by a bank or other lending institution, the Administration shall limit the amount of deferred participation to 80 per centum of the amount of the loan at the time of disbursement: *Provided further*, That any authority conferred by this subparagraph on the Administration be exercised solely by the Administration and shall not be delegated to other than

[1] The court ultimately agrees with the SBA's argument, although it notes that the argument is curious, given that the document in question was drafted by the SBA and from all appearances is a standard form agreement.

Administration personnel.

IV. Procedural Posture; Analysis

The sole remaining issue on the SBA's motion for summary judgment is the effect of 15 U.S.C. § 636(a)(6) on the contract in light of the term allowing the Bank to determine the existence of an "unremedied adverse change."

Following oral argument, the court ordered further briefing on this subject. The parties responded by arguing that the language in the statute supported their respective contentions, with no further citations to cases, legislative history, or other interpretive devices. Faced with conflicting views of the meaning of the statute, and in the absence of any pertinent agency interpretation, *cf. Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the court turns to the statute itself and to the canons of statutory interpretation.

First, it is necessary to engage in a somewhat pedantic and unavoidably ponderous definition of the terms used in the statute. Unfortunately, Congress was less than precise in denominating various categories and sub-categories of the statute. Specifically, in the language in question, Congress refers to "this subsection" and "this subparagraph," without designating the meaning of either term. A reading of other portions of the statute provides little guidance, as Congress refers to various divisions and their subdivisions by the term "subsection" (for example, 15 U.S.C. § 636(a) might be called a "subsection;" 15 U.S.C. § 636(a)(6) might also be called a "subsection"). For the purposes of construing this statute, the court concludes that, by "subsection," Congress intended to refer to § 636(a) and all provisions thereunder.

The term "subparagraph" presents a more difficult question, but one that is nonetheless susceptible of resolution. Reading the statute, the court concludes that Congress uses "paragraph" to refer to the numbered portions of the statute which fall under the subsections. To illustrate by diagram:

§ 636(***a***) is a subsection of the statute;

§ 636(a)(***6***) is a paragraph (*see, e.g.*, 15 U.S.C. § 636(a)(4),

> referring to "paragraph (10) of this subsection");
> § 636(a)(6)(*A*) is a subparagraph. (boldface and italics added)

Applying this definition to the paragraph at issue here (15 U.S.C. § 636(a)(6)), the court is brought up short by a stylistic irregularity in the United States Code. The block of language at the end of § 636(a)(6) which declares nondelegable the exercise of "any authority conferred by this subparagraph on the Administration" does not appear to be a part of any subparagraph, as the court understands that term. Instead of being confined under (A), (B), or (C), this block of language follows (C)[2] and is flush to the left margin, stylistically in line with the language of paragraph (6). This interpretation would lead to the anomalous conclusion that, in limiting the delegating powers conferred by "this subparagraph," Congress actually limited nothing, as "this subparagraph" does not exist.

The plaintiff makes a similar argument, based on the repeal of former subparagraph (C). The plaintiff argues that the limitation on delegation applied to subparagraph (C) and that following the repeal of that provision, the language which is the subject of this dispute was rendered meaningless. In essence, Frillz' argument can be construed as one that Congress intended this provision to expire with the body of subparagraph (C).

As initially enacted by the 97th Congress, the provision in question appeared in the same format as it currently does. That is, the language containing the limitation on the Administration's ability to delegate authority "conferred by this subparagraph" began, without indent, flush to the left margin. Act of August 13, 1981, Pub. L. No. 97-35, § 1902, 1981 U.S.C.C.A.N. (95 Stat.) 357, 769. The court can only conclude that this stylistic treatment was intentional and removed the debated language from the ambit of subparagraph (C), which was repealed.

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[2] In fact, subparagraph (C) is no longer contained in the statute, except to note its repeal.

The Supreme Court has declared, "'[t]he cardinal principle of statutory construction is to save and not to destroy.' *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 [(1937)]. It is [a court's] duty 'to give effect, if possible, to every clause and word of a statute,' *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 [(1883)], rather than to emasculate an entire section ...." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Following this directive, and presuming that Congress does not enact language which is without meaning, the court rejects the plaintiff's argument.

The next question is what the meaning of this language is. The debated sentence declares nondelegable the exercise of "any authority conferred by this subparagraph on the Administration." 15 U.S.C. § 636(a)(6). The question before the court, then, is what authority is conferred by the subparagraph.

Two ambiguities cloud the resolution of this question. The first, discussed above, is what "subparagraph" means in this context. The second is what authority is "conferred" in a block of language (the court now refers to all of § 636(a)(6)) which contains no active grants of authority. The court will address these issues in order.

First, the question of "subparagraph": as tediously described above, this court has concluded that "subparagraph" refers to the capital-lettered blocks of text that fall under the numbered paragraphs. In this case, however, this interpretation is of little use; the subject language is contained in no "subparagraph" as so defined. Furthermore, the block of language in which it appears (that is, the phrases beginning with "On that portion of the loan ..." and ending with the end of paragraph (6)) confers no authority on the Administration. Instead, that block of language contains only a limitation on the Administration's authority; namely, that any portion of a loan which is used to refinance existing indebtedness must be limited. 15 U.S.C. § 636(a)(6).

To give meaning to this limitation, it is necessary to con-

strue it as applying to all of the paragraph in which it appears — that is, § 636(a)(6). It is only in this context that a limitation on "any authority conferred on the Administration" makes any sense. Ever mindful of the Supreme Court's mandate to give effect to statutory language, *Menasche*, 348 U.S. at 538, this court concludes that this limiting language must be read in context with the full paragraph (6).

This determination leads to the second ambiguity, which results from the phrasing of paragraph (6). The root of this difficulty is that the language Congress chose for this paragraph mandates certain criteria for SBA loans, but does not specify who should make the determination of whether a loan meets those criteria. Specifically, the statute dictates, "All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment ..." without delegating authority to make this determination. To belabor the point, if Congress had instead enacted a statute reading "the Administration shall ensure that all loans made under this subsection ..." etc., it would not be necessary for the court to conduct this tortuous linguistic and stylistic analysis. In that case, the "authority conferred" by the (sub)paragraph would clearly be the authority to determine the financial soundness of loans.

The language used by Congress, however, cannot be said unambiguously to confer any authority. Therefore, it is necessary for the court to interpret the statute. In doing so, the court is mindful of legislative intent, both as embodied in the statute and as expressed in any applicable legislative history. Norman J. Singer, 2A *Sutherland on Statutes and Statutory Construction* § 45.05 (Sands 4th ed. 1984).

If the limiting language regarding delegation of authority is to have any meaning at all, it must apply to the Administration's decisions regarding the soundness of loans. The court can discern no other "authority" delegated to the SBA in paragraph (6); the other provisions of that paragraph concern how to determine the soundness of such loans and a limitation on the SBA's deferred participation in loans used to refinance existing debt. Congress must have intended this re-

sult. It is the only interpretation of the limiting provision that gives it any meaning. If this were not the meaning of the limiting provision, that provision would be a superfluity.

The legislative history of paragraph (6) is sparse indeed. This paragraph was introduced to the statute during piecemeal revision of the Small Business Act in 1981. Little legislative ink was devoted to the intent or meaning of this provision, at least as it applies to the situation at hand. These revisions were a small part of the sprawling Omnibus Budget Reconciliation Act of 1981 ("OBRA"), (Act of August 13, 1981, Pub. L. No. 97-35, 1981 U.S.C.C.A.N. (95 Stat.) 357) an act which, as its name implies, was guided by the need to reduce the cost of various federal programs. *See, e.g.*, S. Rep. No. 97-139, 97th Cong., 1st Sess. 1 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 956 (report of the Senate Committee on Small Business). Little more information is available regarding the intent behind these revisions to the Small Business Act. Congress, in keeping with its mandate to cut federal costs, enacted new provisions which scaled back the Small Business Administration, limited the financial exposure of the SBA, and generally restricted the SBA's financial outlay. The parties have not cited to, and the court cannot find, anything in the legislative history that explains or discusses the intended meaning of the paragraph here at issue. In keeping with its understanding that Congress' overall goal was cost containment, the court concludes that the legislative intent which motivated the debated limitation must have been, as the SBA now argues, to forbid SBA delegation of the decision regarding a potential loan's financial soundness. If, as happened in the present case, the SBA could delegate the ability to decide whether a loan met the financial soundness requirements of § 636(a), the SBA could, in essence, delegate the right to bind the government to a losing proposition. This could hardly have been the intent of a Congress so preoccupied with effecting broad federal cost-savings that it scaled back funding for, inter alia, school lunches. (Act of August 13, 1981, Pub. L. 97-35, 1981 U.S.C.C.A.N. (95 Stat.) 357, 521-35)

A public policy analysis of the Small Business Act, particularly as revised in OBRA, also compels the conclusion that this

clause was intended to be read as a limitation on the SBA's ability to delegate determinations such as the one in the Agreement. It seems unlikely, at best, that Congress would allow for delegation of such a determination to a bank whose financial interests could easily be at odds with those of the federal agency. If, as in this case, the bank could make the determination that the loan was sound enough for the SBA, the bank could thereby limit its exposure in the event of a default, since the SBA would be liable for 80% of the bad loan under its guaranty clause, while the bank would have only 20% exposure.

For the foregoing reasons, this court concludes that the meaning of the limitation clause in 15 U.S.C. § 636(a)(6) is that the SBA may not delegate to other than Administration personnel the authority to determine whether a proposed loan is of "such sound value or so secured as reasonably to assure repayment." Because the corollary of this conclusion is that the SBA was prohibited from delegating this authority to Eastern Bank, which the Agreement purported to do, that contract is void. *Tenaska Washington Partners II, L.P. v. United States*, 34 Fed.Cl. 434 (1995) ("It goes without question that an agency of the Federal Government is only empowered to act within the statutory guidelines establishing its power and that any action exceeding its statutory authority is void." *Id.* at 440, citing *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990)); *see AST/Servo Systems, Inc. v. United States*, 449 F.2d 789 (Ct.Cl. 1971) (where sale of military goods exceeded statutory authority of Air Force to sell them, sale held invalid); *see also REW Enterprises, Inc. v. Premier Bank, N.A.*, 49 F.3d 163 (5th Cir. 1995) (Federal land bank's act of honoring letter of credit for benefit of lender was ultra vires and void where statute did not authorize such act); *Hall v. United States*, 19 Cl.Ct. 558 (1990), aff'd without opinion, 918 F.2d 187 (Fed.Cir., 1990). Because, therefore, the contract between the bank and the SBA was void, at least insofar as it purported to transfer to the Bank the authority to determine whether an "unremedied adverse change" had occurred, summary judgment is appropriate for the defendant, SBA.

The defendant's motion for summary judgment is

GRANTED. Judgment shall enter for the defendant.

So ordered.

/s/ Reginald C. Lindsay
United States District Judge

DATED: 5/15/96

APPENDIX D

15 U.S.C. § 636(a)(6) (1982)

§ 636. Additional Powers

(a) Loans to small-business concerns; allowable purposes; qualified business; restrictions and limitations

(6) All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment: *Provided, however*, That —

(A) for loans to assist any public or private organization or to assist any handicapped individual as provided in paragraph (10) of this subsection any reasonable doubt shall be resolved in favor of the applicant;

(B) recognizing that greater risk may be associated with loans for energy measures as provided in paragraph (12) of this subsection, factors in determining 'sound value' shall include, but not be limited to, quality of the product or service; technical qualifications of the applicant or his employees; sales projections; and the financial status of the business concern: *Provided further*, That such status need not be as sound as that required for general loans under this subsection; and

(C) the Administration shall not decline to participate in a loan on a deferred basis under this subsection solely because such loan will be used to refinance all or any part of the existing indebtedness of a small business concern, unless the Administration determines that —

(i) the holder of such existing indebtedness is in a position likely to sustain a loss if such refinancing is not provided, and

(ii) if the Administration provides such refinancing through an agreement to participate on a deferred basis, it will be in a position likely to sustain part or all of any loss which would have otherwise been sustained by the holder of the

original indebtedness: *Provided further*, That the Administration may decline to approve such refinancing if it determines that the loan will not benefit the small business concern.

On that portion of the loan used to refinance existing indebtedness held by a bank or other lending institution, the Administration shall limit the amount of deferred participation to 80 per centum of the amount of the loan at the time of disbursement: *Provided further*, That any authority conferred by this subparagraph on the Administration shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel.

15 U.S.C. § 636(a)(6) (1988)

§ 636. Additional Powers

(a) Loans to small-business concerns; allowable purposes; qualified business; restrictions and limitations

(6) All loans made under this subsection shall be of such sound value or so secured as reasonably to assure repayment: *Provided, however*, That —

(A) for loans to assist any public or private organization or to assist any handicapped individual as provided in paragraph (10) of this subsection any reasonable doubt shall be resolved in favor of the applicant;

(B) recognizing that greater risk may be associated with loans for energy measures as provided in paragraph (12) of this subsection, factors in determining `sound value' shall include, but not be limited to, quality of the product or service; technical qualifications of the applicant or his employees; sales projections; and the financial status of the business concern: *Provided further*, That such status need not be as sound as that

required for general loans under this subsection; and [1]

(C) Repealed. Pub. L. 97-35, title XIX, § 1910, Aug. 13, 1981, 95 Stat. 778.

On that portion of the loan used to refinance existing indebtedness held by a bank or other lending institution, the Administration shall limit the amount of deferred participation to 80 per centum of the amount of the loan at the time of disbursement: *Provided further*, That any authority conferred by this subparagraph on the Administration shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel.

13 C.F.R. § 101.3-2 (1993)

§ 101.3-2. Delegations of authority to conduct program activities in field offices.

Pursuant to authority vested in me by the Small Business Act, 72 Stat. 384, as amended, and the Small Business Investment Act of 1958, 72 Stat. 689, as amended, the following authority is hereby delegated to field positions as hereinafter set forth:

....

PART I — FINANCING PROGRAM

Section A — Loan Approval Authority

1. Business Loans (Small Business Act) (SBAct).

b. *Guaranty loans.* 7(a) business loans (except loans made pursuant to sections 7(a)(12), 7(a)(13), and 7(a)(16)):

	Approval ($)	Decline ($)
....		
(7) Chief, Financing , D/O	750,000	750,000
....		

....

[1] So in original. The "; and" probably should be a period.

Section B — Other Financing Authority

For all types of loans contained in Section A above, (except loans made pursuant to section 7(a)(13)):

2. To cancel, reinstate, modify, and amend authorizations:

....

g. Chief, Financing, D/O (on fully disbursed loans).

....

3. Disbursement period extension. To extend disbursement periods:

a. Without limitations:

....

(7) Chief, Financing, D/O (on fully disbursed loans).

....

PART XI — REDELEGATION AUTHORITY

Section A — Redelegation

1. The authority delegated herein may not be redelegated.

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, Title XIX, § 1910, 95 Stat. 357, 778 (1981)

TITLE XIX — SMALL BUSINESS

SEC. 1910. Sections 7(a)(6)(C), 7(a)(9), and 7(a)(10) of the Small Business Act as enacted herein are repealed October 1, 1985.

(2)

Supreme Court, U.S.
FILED
JUL 10 1997
OFFICE OF THE CLERK

No. 96-1885

In the Supreme Court of the United States

OCTOBER TERM, 1996

FRILLZ, INC., PETITIONER

v.

AIDA ALVAREZ, ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Small Business Administration (SBA) properly refused to authorize disbursement of an SBA-guaranteed loan to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 104 F.3d 515. The opinion of the district court (Pet. App. 12-21) is reported at 925 F. Supp. 83.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1997. A petition for rehearing was denied on February 20, 1997. Pet. App. 10-11. The petition for a writ of certiorari was filed on May 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In February 1993, the Small Business Administration (SBA) agreed to guarantee 80% of a $612,000 loan to be made by Eastern Bank (the Lender) to petitioner. Pet. App. 2, 13. The SBA conditionally authorized the loan guaranty by signing (through Gordon J. Ryan, the Chief of the agency's Finance Division) an "Authorization and Loan Agreement" (Agreement), which petitioner also signed. *Id.* at 5, 13. Actual disbursement of the loan by the Lender was to occur at a later date, within a time frame prescribed by the Agreement. *Id.* at 13. The Agreement provided that continued authorization of the SBA's loan guaranty was conditioned upon receipt by the Lender of "evidence satisfactory to it in its sole discretion, that there has been no unremedied adverse change since the date of the Application * * * in the financial or any other conditions of [petitioner], which would warrant withholding or not making any such disbursement." *Id.* at 2.

After the SBA conditionally authorized the loan guaranty, the agency granted several extensions of the date of the first disbursement of the loan. Pet. App. 13. During that time, petitioner's business deteriorated and the loan funds were not disbursed. *Ibid.* Petitioner's business subsequently improved, and the Lender wrote the SBA that the adverse change in petitioner's financial condition had been remedied to the Lender's satisfaction. *Id.* at 2, 13-14. The SBA was unconvinced, however, and continued to refuse authorization of the disbursement. *Id.* at 14. The loan was never disbursed.

2. Petitioner filed suit, maintaining that the SBA was in violation of that portion of the Agreement

which stated that the determination whether petitioner suffered an "unremedied adverse change" was to be in the Lender's "sole discretion." Pet. App. 2-3, 13. Under petitioner's theory, the SBA should have approved disbursement of the loan, despite its concerns about the petitioner's weak financial condition, upon the Lender's conclusion that petitioner had remedied the previous adverse change in its business. *Id.* at 3, 13-14.

The district court entered summary judgment in favor of the SBA on the basis of 15 U.S.C. 636(a)(6), which provides that the SBA's authority to ensure that the loans guaranteed by the agency shall "be of such sound value or so secured as reasonably to assure repayment," must "be exercised solely by the Administration and shall not be delegated to other than Administration personnel." Pet. App. 4 n.1, 14-15, 20-21. In light of that statutory language, the district court concluded that the SBA could not delegate authority to determine the soundness of a loan to outside financial institutions such as the Lender. *Id.* at 14. The court rejected petitioner's contention that Congress had effectively repealed the statutory restriction on the delegation of authority in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1910, 95 Stat. 778. See Pet. App. 16-17.

3. The court of appeals affirmed without relying on the statutory prohibition on delegation or resolving the issue of whether it had been repealed. Pet. App. 3-4 & n.1. Instead, the court held that any delegation of authority that may have been embodied in the Agreement was independently precluded by SBA regulations, which prohibited the Chief of the SBA's Finance Division from redelegating his authority to approve or reject loans, to extend disbursement

periods, and to cancel, reinstate, and modify loan authorizations. See 13 C.F.R. 101.3-2, Pt. I, §§ A(1)(b), B, and Pt. XI, § A(1) (1993); Pet. App. 5, 24-25. The court specifically rejected petitioner's attempt to avoid application of those regulations by characterizing as an ordinary "loan term" that portion of the Agreement that gave discretion to the Lender to determine any unremedied adverse changes. The court found that "[g]ranting the Lender the right to determine the soundness of a loan guaranty constitutes a significant relinquishment of power." *Id.* at 6.*

Accordingly, the court concluded that "because the Chief of the Finance Division had no authority to delegate to the Lender the determination of whether [petitioner] had suffered an unremedied adverse change in its financial condition, the government cannot be bound by that stipulation in the loan guaranty authorization." Pet. App. 6.

ARGUMENT

Petitioner argues at length (Pet. 6-11) that this Court should decide whether Congress in 1985 repealed that portion of 15 U.S.C. 636(a)(6) that provides that the agency's authority "shall be exercised solely by the Administration and shall not be delegated to other than Administration personnel." The statute's

---

* The court of appeals also refused to permit petitioner to pursue its alternative claim that the SBA was equitably estopped from withholding its approval of the loan disbursement, observing that the doctrine of equitable estoppel generally has no application to the federal government, and that there was "absolutely no evidence" in this case of any affirmative misconduct by the SBA which might even "arguably" give rise to such a claim. Pet. App. 6-7.

purported repeal, however, was not a basis for the court of appeals' decision. That decision rested entirely on the prohibition against redelegation independently contained in the agency's regulations. Moreover, the court of appeals' conclusion that SBA regulations precluded the loan disbursement sought by petitioner is correct and does not conflict with any decision of this Court or any other court of appeals or district court. Accordingly, further review is not warranted.

1. SBA regulations in effect at the time of petitioner's Agreement provided that the agency's Finance Division Chief was authorized to approve or reject loans up to $750,000, 13 C.F.R. 101.3-2, Pt. I, § A(1)(b)(7) (1993), as well as to "cancel, reinstate, modify, and amend authorizations," *id.* § B(2)(g), and to "extend disbursement periods * * * without limitations." *Id.* § B(3)(a)(7). See Pet. App. 24-25. The regulations made clear, however, that those delegations of authority to the Finance Chief could "not be redelegated." 13 C.F.R. 101.3-2, Pt. XI, § A(1). The court of appeals properly relied on the unambiguous terms of the agency's regulations to conclude that the Finance Chief was without authority to vest the Lender with the sole discretion to determine when to disburse an SBA-guaranteed loan.

Petitioner contends that "[t]he adverse change clause of the Agreement does not constitute a delegation of the authority to 'approve' an SBA loan, and therefore does not exceed the [Finance] Chief's authority." Pet. 12. On petitioner's reading, however, that clause purported to delegate to non-SBA personnel the authority to ascertain whether there had been a change in the conditions upon which SBA decided to "approve" the loan guarantee. The court of

appeals therefore correctly perceived that, so read, the "adverse change" clause effectively relinquished the SBA's authority over the loan approval process. See Pet. App. 6. And even if the adverse change determinations under the Agreement were not an integral part of the loan approval process, the grant of sole discretion to the Lender in that regard would plainly interfere with the Finance Chief's non-delegable power to "cancel, reinstate, modify, and amend authorizations." See 13 C.F.R. 101.3-2, Pt. I, § B(2)(g). As the court of appeals observed (Pet. App. 6), petitioner cannot circumvent the agency's non-delegation regulations by simply attaching a different label to the relevant contractual provision.

2. Petitioner also contends (Pet. 12) that the Agreement's inclusion of the typed name of the Acting Administrator, above the signature of the SBA's Chief of the Finance Division, demonstrates that the Chief "was acting under the apparent authority of the Acting Administrator," and that therefore the Chief's grant of discretion to the Lender was not *ultra vires*. Because petitioner first set forth this theory fully in its petition for rehearing, and gave this argument only "a passing mention in a footnote to [its] reply brief," the court of appeals deemed the argument to have been waived. Pet. App. 10-11 (order denying rehearing). The appeals court's waiver determination is in accord with its own decisions, see *Kale* v. *Combined Insurance Co.*, 924 F.2d 1161, 1169 (1st Cir.) (rejecting party's attempt to raise new issue for first time on petition for rehearing), cert. denied, 502 U.S. 816 (1991); *Sandstrom* v. *ChemLawn Corp.*, 904 F.2d 83, 87 (1st Cir. 1990) (holding that parties cannot raise new theories for the first time in a reply brief), as well as those of other circuits that have declined

to consider legal theories which parties had failed to preserve in their principal briefs, and does not warrant further review by this Court. See *Pfaff* v. *United States Dep't of Housing and Urban Dev.*, 88 F.3d 739, 750 n.7 (9th Cir. 1996) ("issues unsupported by argument are deemed abandoned" unless "manifest injustice" would result); *United States* v. *Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (per curiam) (declining to consider argument mentioned in brief without any explication).

In any event, petitioner's contention that the Acting Administrator's typewritten name on the signature block of the Agreement is an "endorsement" of the Agreement which gave the Chief apparent authority to ignore the regulatory prohibition against delegation (Pet. 12) is meritless. It is well settled that persons entering into arrangements with the federal government assume "the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947). See *United States* v. *Beebe*, 180 U.S. 343, 351-355 (1901); *Stone* v. *Bank of Commerce*, 174 U.S. 412 (1899). Petitioner has alleged no actions on the part of the Acting Administrator that should have led it to conclude that the Acting Administrator knew about, let alone consented to, the purported delegation of authority in the Agreement. Standing alone, the presence of the typewritten name of the Acting Administrator over the Finance Chief's signature on the Agreement does not constitute a reasonable basis on which petitioner could have concluded that

the Acting Administrator approved a delegation of authority inconsistent with the agency's formally promulgated regulations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1997